86-276

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM CONWAY, *et al.*,
Cross-Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,
Cross-Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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QUESTIONS PRESENTED

1. Whether Vermont's 1982 truck fee statute (which created a $50 user fee for all trucks, but simultaneously reduced the registration fee for Vermont-registered trucks by $50) was discriminatory on its face against interstate commerce, and thus violative of the Commerce Clause, notwithstanding that (a) under that statute, Vermont-registered trucks paid combined registration and user fees 5 to 25 *times* the user fee paid by non-Vermont trucks, and (b) the registration and user fees both were deposited in the State Transportation Fund and used to finance highway construction and maintenance.

2. Whether Vermont's 1981 truck fee statute (which imposed a user fee only on out-of-state trucks, but a much higher registration fee only on Vermont trucks) was discriminatory on its face against interstate commerce, notwithstanding that the registration and user fees both were deposited in the State Transportation Fund and used to finance highway construction and maintenance.*

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* The parties are accurately listed at pp. ii-iii of the petition in No. 86-69, except that certain of the officers of the State of Vermont have changed. The present Governor of Vermont is Madeline M. Kunin, the present Commissioner of Public Safety is James Walton, and the present Secretary of the Agency of Transportation is Susan Crampton.

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v.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

Cross-Petitioners, in their official capacities on behalf of the State of Vermont,[1] petition for a writ of certiorari to review the judgments of the Supreme Court of Vermont in these related cases, the writ to issue, however, only in the event that this Court grants the petition for writ of certiorari in No. 86-69.

OPINIONS BELOW

The opinions of the Supreme Court of Vermont are accurately cited at pp. 1-2 of the petition in No. 86-69 (hereinafter cited as "ATA Pet."), and are reprinted in the Appendix to that petition.

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[1] Cross-petitioners are the Commissioner of Motor Vehicles, Commissioner of Public Safety, Governor, and Secretary of the Agency of Transportation of the State of Vermont.

JURISDICTION

The judgments of the Supreme Court of Vermont (ATA Pet. App. B and D) were entered on February 21, 1986. Justice Marshall extended the time to petition for a writ of certiorari to July 21, 1986. The petition in No. 86-69 was filed on that date, and was received by respondents therein (cross-petitioners here) on July 23, 1986. This conditional cross-petition is filed within 30 days thereafter, as required by this Court's Rule 19.5.

Cross-petitioners believe that this Court does not have jurisdiction over the petition in No. 86-69, because the question presented therein was never presented to the Supreme Court of Vermont. This point will be demonstrated in the brief in opposition in No. 86-69. If this Court lacks jurisdiction over the petition in No. 86-69, it lacks jurisdiction over this cross-petition as well by virtue of Rule 20.5.

If however, this Court concludes that it has jurisdiction over the petition in No. 86-69, then it has jurisdiction over this cross-petition pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Commerce Clause of the Constitution of the United States, Article I, § 8, clause 3, provides:

> The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States. . . .

The Vermont statutory provisions pertinent to this cross-petition are set forth in the Appendix hereto.

STATEMENT

A substantial portion of Vermont's revenues are devoted to the construction and maintenance of its highways and roads. To finance these services, the Vermont

legislature has created a segregated "Transportation Fund," into which all revenues derived from taxes and fees on motor vehicles, *inter alia*, are deposited. 23 V.S.A. § 8 (Supp. 1982). That fund is used almost exclusively for the construction and maintenance of highways and roads. 23 V.S.A. § 9 (Supp. 1982).

Large trucks, because of their weight, cause considerably more wear and tear on highways than smaller vehicles. Consequently, a large percentage of highway maintenance costs is attributable to usage by such trucks. Appendix to Petition in No. 86-69 (hereinafter "ATA Pet. App.") at 73a-74a. Vermont's highways are traveled, of course, both by large trucks registered in Vermont and by large trucks registered in other states.

Trucks *registered in Vermont* are charged an annual registration fee varying with the weight of the truck, the entire amount of which is deposited in the Transportation Fund and thus used for highway construction and maintenance. Vermont's registration fees are among the highest in the nation. In 1981, a Vermont-registered truck weighing 18,000 pounds paid an annual registration fee of $236.70. 23 V.S.A. § 367 (Supp. 1981). The registration fees increased progressively with the weight of the truck; thus, *e.g.*, a Vermont-registered truck weighing 80,000 pounds paid an annual registration fee of $1,176 (*id.*).[2]

Trucks registered in other states are exempted by Vermont from the obligation to register, and thus to pay these registration fees, if their state of registration accords a like exemption to Vermont-registered trucks (as most States do). 23 V.S.A. § 411.[3] But, since 1951, Vermont has charged user fees to trucks not registered in

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[2] Vermont-registered trucks are also liable for purchase and use taxes, which are paid into the Transportation Fund (ATA Pet. App. 8a, 76a).

[3] Non-Vermont trucks also are not obliged to pay the purchase and use taxes referred to in n.2, *supra*. (ATA Pet. App. 8a, 76a.)

Vermont, which likewise are deposited in the Transportation Fund and used for highway construction and maintenance. Under the 1981 Act challenged in *ATA I*, this was accomplished through a permit fee system; each such truck was charged $40 per year, plus $15 each time the truck entered the state; these fees were not charged to trucks registered in Vermont. 23 V.S.A. §§ 415, 417 (Supp. 1981).[4]

The 1982 Act, challenged in *ATA II*, changed the system in the following respects. The permit fees for non-Vermont trucks were eliminated. For *all* trucks of 18,000 pounds or more—whether or not registered in Vermont—a flat $50 annual user fee was imposed as a condition to using Vermont's highways, all proceeds going to the Transportation Fund. 23 V.S.A. §§ 415, 3007 (Supp. 1982).[5] Simultaneously, the registration fee, applicable only to Vermont-registered trucks, was reduced by $50 for trucks weighing 18,000 pounds or more. 23 V.S.A. § 367(a) (Supp. 1982).[6]

The net effect of these changes was as follows. Under the 1982 Act, a non-Vermont registered truck of 18,000 pounds or more paid a flat $50 annual user fee to Ver-

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[4] In lieu of these fees, a non-Vermont truck could secure a single trip permit for $40. 23 V.S.A. § 415a (Supp. 1981).

[5] In lieu of the user fee, any truck could purchase a license for a single trip into Vermont for the same $50. 23 V.S.A. §§ 415(c), 3010 (Supp. 1982).

[6] More precisely, the 1982 Act, after listing a schedule of registration fees, stated that the registration fee for trucks exceeding 18,000 pounds "shall be $50.00 less than the fee computed in accordance with" the schedule. 23 V.S.A. § 367 (Supp. 1982). As the registration fee schedule itself was *increased* by the 1982 Act for trucks exceeding 60,000 pounds (*id.*), Vermont-registered trucks exceeding that weight confronted a net increase in combined registration and user fees in 1982 over the registration fees they had paid in 1981; indeed, Vermont-registered trucks exceeding 70,000 pounds confronted a net increase in registration fees alone (because the schedule increase at those weights exceeded the $50 reduction), wholly apart from the $50 user fee they were now also required to pay.

mont's Transportation Fund. A comparable Vermont registered truck paid to the Fund combined registration and user fees ranging from $236.70 (for an 18,000 pound truck) to $1,240.00 (for an 80,000 pound truck).

In *ATA I* (ATA Pet. App. 15a-21a), the Vermont Supreme Court declared the 1981 statute imposing the permit fees violative of the Commerce Clause, because "on its face [it] discriminates against interstate commerce . . . [F]oreign-registered truckers must pay the fees while Vermont-registered truckers and their customers are protected from the impact of the tax." (*Id.* 19a). The lower court had upheld the permit fees as "compensatory" for the much higher registration fees paid by Vermont-registered trucks, stating that the two form "a single structure of user fees for Vermont roads" (App. 76a). The Vermont Supreme Court rejected this reasoning with the following explanation (*Id.* 19a-20a):

> It is true that the members of the plaintiff class need pay neither Vermont registration fees, 23 V.S.A. § 411, nor the sales and use taxes, 32 V.S.A. § 8903. They need not pay these fees and taxes *only because* they have registered their vehicles, and therefore paid their registration fees, in their home state. Having thus waived the right to impose either the sales and use tax or the registration fee upon foreign-registered trucks, Vermont may not point to those taxes as complementary for the purpose of saving an otherwise discriminatory tax. As the Maine Supreme Judicial Court said:
>
> > . . . In a practical economic sense, reciprocity represents an indirect contribution by foreign-based trucks to the treasury of the State of Maine; the agreement of their home states not to tax Maine-based trucks leaves Maine free to collect more than it otherwise could from its own truckers.
>
> *American Trucking Associations, Inc. v. Quinn*, 437 A.2d [623], at 627 [Me. 1981]. [Footnotes omitted; emphasis in opinion.]

In *ATA II* (ATA Pet. App. 1a-12a), the Vermont Supreme Court declared the 1982 user fee likewise discriminatory on its face and thus violative of the Commerce Clause. The Court reasoned that although the 1982 Act imposed the $50 user fee on Vermont as well as non-Vermont trucks,

> it also reduced by $50.00 the registration fee owed by Vermont truck operators or owners with trucks weighing 18,000 pounds or over. . . . The registration fee reduction shifts the entire impact of the user fee legislation onto foreign operators, thereby discriminating against them. [*Id.* at 7a.]

As in *ATA I*, the Court rejected the State's contention that the fee imposed on non-Vermont trucks was compensatory for the much higher combined registration and user fees imposed on Vermont trucks (*id.* 8a-9a).[7]

REASONS FOR GRANTING THE WRIT

In No. 86-69, petitioners seek review of the decisions below insofar as they failed, after finding certain statutes to be unconstitutional, to order a refund of fees collected

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[7] In both *ATA I* and *ATA II*, the Court's decision rested solely on the proposition that the statutes facially discriminated against interstate commerce. The Court did not address ATA's alternative argument that the fees were not fairly apportioned when viewed in relation to the average per-mile usage of Vermont highways by Vermont and non-Vermont trucks. The latter argument is inconsistent with this Court's decisions upholding "flat fees" in *Aero Transit Co. v. Georgia Comm'n*, 295 U.S. 285 (1935); *Dixie Ohio Co. v. Comm'n*, 306 U.S. 72 (1939); *Aero Transit v. Comm'rs*, 332 U.S. 495 (1947); *Evansville Airport v. Delta Airlines*, 405 U.S. 707, 715 (1972); *Massachusetts v. United States*, 435 U.S. 444, 463-67 (1978). Because of that inconsistency, ATA's latter argument has been rejected in recent decisions of the highest courts of Maryland and Arkansas. *American Trucking Ass'ns v. Goldstein*, 301 Md. 372, 483 A.2d 47 (1984); *American Trucking Ass'n v. Gray*, 707 S.W.2d 759 (Ark. 1986).

thereunder. We are filing a brief in opposition to that petition in which we suggest that this Court lacks jurisdiction over that petition, and in any event should deny the petition. If, however, this Court were to grant that petition, it should not decide whether the federal Constitution compels a refund without first addressing the question—substantial, as we show below—whether those statutes were correctly held to be unconstitutional. Perforce, if the statutes were constitutional, as we submit they were, there is no occasion to reach the refund issue.[8]

1. In *ATA II*, the Supreme Court of Vermont held that Vermont's 1982 tax scheme discriminated on its face against interstate commerce, although it imposed an identical $50 user fee as a condition to using Vermont's highways on both Vermont and non-Vermont trucks, and although all told it required Vermont trucks (depending on their weight) to pay combined user and registration fees to the State Transportation Fund from 5 to 25 *times* the user fee charged to identical-weight non-Vermont trucks. This counter-intuitive ruling is in direct conflict with a subsequently-issued decision of the Supreme Court of Pennsylvania upholding an analytically indistinguishable taxing scheme. *American Trucking Associa-*

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[8] Because the statutes at issue have been amended by the Vermont General Assembly in light of the decisions of the Vermont Supreme Court—the new statute retains the $50 user fee for both Vermont and non-Vermont trucks, but eliminates the $50 reduction in Vermont registration fees—the State has no interest in securing review of the holdings below that the former statutes were unconstitutional, apart from the possibility that a refund might be compelled by this Court. That is why the State did not petition directly for a writ of certiorari, but instead has elected to file this conditional cross-petition. The State believes that it can resist a refund on the basis of the constitutionality of the statutes without the need for a cross-petition, but there is sufficient doubt about the matter to prompt this conditional cross-petition. *See*, Stern, Gressman & Shapiro, *Supreme Court Practice* 382-87 (6th Ed. 1986), and cases discussed therein.

tion, Inc. v. Scheiner, 509 A.2d 838 (May 6, 1986).[9] It is, as well, contrary to this Court's prior decisions in this field.

Scheiner involved a 1982 Pennsylvania statute which created, for the first time, an Axle Tax for Highway Bridge Improvement. Under that statute, every truck over 26,000 pounds (whether Pennsylvania-registered or not) was required to pay an annual tax of $36 per axle ($180 for most large trucks) as a condition to using Pennsylvania's highways. The statute creating the axle tax simultaneously reduced the registration fee for Pennsylvania trucks by almost exactly the amount of the axle tax. 509 A.2d at 842-43.

The American Trucking Association asserted the identical Commerce Clause challenge to that statute as it did to Vermont's, but the arguments found persuasive by the Supreme Court of Vermont were squarely rejected by the Supreme Court of Pennsylvania.

The ATA argued in *Scheiner* that:

> [T]he imposition of the $36 per axle tax upon all motor carrier vehicles, accompanied by Act 234's simultaneous reduction in the Pennsylvania registration fees almost exactly offsetting the amount of the axle tax for Pennsylvania registered vehicles, was facially and actually discriminatory and imposed the full burden of the axle tax upon non-Pennsylvania registered interstate motor carriers [*Id.* at 846].

The Supreme Court of Pennsylvania, noting that the registration fee paid by Pennsylvania trucks after the reduction, coupled with the axle tax which they now bore, was several times higher than the axle tax borne by non-Pennsylvania trucks, rejected the argument in these terms:

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[9] The only difference in the two schemes is the amount of the user fee: $50 in Vermont, $180 for most trucks in Pennsylvania.

> There is no discrimination in such a taxing scheme in practical operation. In focusing solely on the registration fee *reductions*, the Commonwealth Court [which accepted the ATA's contention] ignores the fact that "local commerce" (Pennsylvania's registered motor carrier vehicles) remains subject to substantial highway user fees that "interstate commerce" (vehicles owned by members of the class and subclass represented by appellees) is not subject to. [*Id.* at 854; emphasis in opinion.]

The ATA also argued in *Scheiner* that the axle tax should not be considered a "compensatory tax" for the registration fee because non-Pennsylvania trucks had to pay registration fees to their own states. While that contention persuaded two dissenters (*id.* at 860), it was rejected by the Court, which concluded that the axle tax was compensatory for the registration fee:

> Members of the class and subclass represented by appellees ("interstate commerce") bear less of the burden of Pennsylvania's highway user fees than do Pennsylvania registered motor carrier vehicles ("local commerce"). . . . It is entirely proper for a state to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of that state's taxing scheme. *Alaska v. Arctic Maid*, 366 U.S. 199 . . . (1961); *Halliburton Oil Well Cementing Co. v. Reilley*, 373 U.S. 64 . . . (1963); *Henneford v. Silas Mason Co.*, 300 U.S. 577 . . . (1937). In easing the burden on Pennsylvania registered vehicles, the Commonwealth has neither disadvantaged interstate commerce nor favored local commerce, and the axle tax does not, therefore, discriminate against interstate commerce. [509 A.2d at 855.]

That the Vermont and Pennsylvania decisions cannot both be correct interpretations of the Commerce Clause is evident. And it is Vermont's Supreme Court, not Pennsylvania's, which has misunderstood this Court's controlling decisions.

The Pennsylvania Court is clearly right in holding that there is no *facial* discrimination merely because the adoption of a user fee applicable equally to both in-state and out-of-state trucks is accompanied by an offsetting reduction in the registration fee borne solely by in-state trucks. For the critical test is whether, after that adjustment, interstate commerce is being charged a disproportionate share of the cost of constructing and maintaining the state's highways; an adjustment of this nature may simply eliminate a "free-ride" theretofore enjoyed by interstate commerce. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583-585 (1937); *Alaska v. Arctic Maid*, 366 U.S. 199, 204-05 (1961).

Likewise, the Pennsylvania Court is correct in viewing the user fee as "compensatory" for the registration fee borne solely by in-state trucks. The test adopted by this Court is that taxes and fees are compensatory if they are "designed to meet [the] same ends," are "impose[d] . . . on a substantially equivalent event to assure uniform treatment . . .," and provide "equality of treatment between local and interstate commerce." *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). It can hardly be questioned that the Vermont fees meet the first two criteria: registration fees and user fees both are imposed for use of the state's highways, and both are paid into the state's Transportation Fund to finance the cost of highway construction and maintenance. And, the court below did not find an absence of "equality of treatment" in the economic sense intended by this Court; rather, the statute here was declared discriminatory on its face without inquiry into whether interstate commerce was being made to pay a disproportionate share of Vermont's highway costs.

The court below held the user fee not "compensatory" on a ground that has no foundation in this Court's prior decisions: that because Vermont and other states have reciprocal statutes exempting each others' trucks from registration fees, that exemption, as a matter of consti-

tutional law, disqualifies Vermont from justifying user fees as compensatory for registration fees. That reasoning appears contrary to *Henneford, supra*, 300 U.S. at 487. In any event, it has no anchor in the controlling principle announced by this Court: that "interstate commerce can be made to pay its way." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977).

First, while the reciprocal statutes exempt out-of-state trucks from *registration* fees, they do not exempt out-of-state trucks from *user* fees (ATA Pet. App. 73a-74a). In consequence, Vermont trucks are charged fees whenever they drive in the many states that have such fees. (ATA Pet. App. 73a-74a). The Supreme Court of Vermont thus was not correct in its central premise: that "[w]hen a Vermont trucker pays his registration fee . . . [he] purchases the right to operate in other States as well as Vermont." (ATA Pet. App. 8a). And because that premise was wrong, so was the constitutional holding that the court predicated on that premise: that non-Vermont truckers, by registering in *their* states, must be deemed to have purchased the right to operate in Vermont.[10]

Second, there is no necessary connection between reciprocal registration exemptions and the state's interest in making interstate commerce pay its way. The court below reasoned that the other states' exemption of Vermont trucks from foreign registration "leaves [Vermont] free to collect more than it otherwise could from its own truckers" (App. 19a-20a). But this would be the case regardless whether Vermont trucks represented 1% or 99% of the trucks using its highways. In either instance, Vermont's highway construction and maintenance costs would

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[10] This precise point had been made by the trial court in *ATA I*, in upholding the fees challenged therein (ATA Pet. App. 76a-77a). The Supreme Court of Vermont's decisions contain no answer to it.

be the same. But in the former instance, Vermont would have to impose a registration fee on Vermont trucks 99 times greater than in the latter in order to finance that cost.[11] And the beneficiaries would be truckers from other states who could use Vermont's highways while paying much lower registration fees to their own states (because those states could spread *their* highway costs over a larger number of in-state registrants). As is evident, reciprocal registration exemptions would result in interstate commerce paying its way in each state only on the unlikely fortuity that each of the states had the same percentage mix of in-state and out-of-state trucks using its highways.

2. In *ATA I*, the Supreme Court of Vermont struck down as discriminatory the prior Vermont law, under which the user fees (then called permit fees) were imposed solely on non-Vermont trucks, while the registration fee for Vermont trucks was unreduced (*i.e.*, $50 higher than under the later law discussed above). The court reasoned that the permit fee statute was discriminatory on its face—because the fees were imposed only on non-Vermont trucks—and refused, for the reason we have already discussed, to treat the permit fees as "compensatory" for the registration fee.

We have shown above that the reasoning by which the Supreme Court of Vermont concluded that the charge to non-Vermont trucks was not "compensatory" is contrary to this Court's decisions. And, as the permit charge *was* compensatory, the earlier statute was constitutional for the same reasons as the later one.

3. The decisions below, we submit, unquestionably are wrong in holding the Vermont statutes unconstitutional.

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[11] While the hypothetical is, of course, an exaggeration of Vermont's actual plight, the reality is that in order to finance its highway construction and maintenance costs—and even with the $50 user fee now in place—Vermont has one of the highest registration fee schedules in the country.

But even if there were doubt on that score, the existing conflict and the obvious importance of the issue warrant the granting of this cross-petition if the Court grants the petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, if the Court grants the petition for writ of certiorari in No. 86-69, then it should also grant this conditional cross-petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

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VERMONT STATUTES INVOLVED

I. PROVISIONS APPLICABLE TO BOTH THE 1981 AND 1982 ACTS

23 V.S.A. § 8 (Supp. 1982):

§ 8. Transportation fund

The transportation fund shall be comprised of the following:

(1) All taxes, penalties and fees received by the commissioner of motor vehicles as head of the department of motor vehicles which shall be paid into the state treasury.

(2) The revenue derived from the tax on motor fuel as provided for by section 8806 of Title 32, which shall be paid into the state treasury.

(3) [Repealed.]

(4) Moneys received by the transportation agency for rental of machinery and equipment; for services rendered and from all other sources, which shall be paid into the state treasury.

(5) All grants from the federal government and regional associations for transportation purposes.

(6) Moneys received from the sales and use tax on aviation jet fuel and railroad fuel taxed under chapter 233 of Title 32.

(7) Receipts from pilot and aircraft license fees under Title 5.

23 V.S.A. § 9:

§ 9. Appropriations to highway department

Monies appropriated from the highway fund to the highway department shall be appropriated to highway department accounts for the following purposes:

(1) Construction and maintenance on the state highways.

(2) Construction and maintenance on class 1, 2, 3 or 4 town highways.

(3) Construction and maintenance on forest and park roads.

(4) General administration of the department of highways, including a grant for pensions.

(5) Debt service for principal and interest of highway bonds.

(6) In the event the revenues of the highway fund exceed the appropriation of this section and other appropriations from said fund, the balance shall be appropriated to the highway board to be used for the account "debt service for principal and interest of highway bonds" and for the account "construction to the state highways."

(7) State highway garage, into which shall be covered all receipts from rental of trucks, machinery and equipment and other income of the state highway garage.

23 V.S.A. § 411:

§ 411. Reciprocal provisions

As determined by the commissioner of motor vehicles, a motor vehicle owned by a nonresident, shall be considered as registered and a nonresident operator shall be considered as licensed in this state, if the nonresident owner or operator has complied with the laws of the foreign country or state of his residence relative to the registration of motor vehicles and the granting of operators' licenses. Any exemptions provided in this section shall, however, be operative as to an owner or operator of a motor vehicle only to

the extent that under the laws of the foreign country or state of his residence like exemptions and privileges are granted to operators duly licensed and to owners of motor vehicles duly registered under the laws of this state. If the owner or operator is a resident of a country not adjoining the United States, such exemptions shall be operative for a period of thirty days for vacation purposes notwithstanding that such country does not grant like privileges to residents of this state. Such exemptions shall not be operative as to the owner of a motor truck used for the transportation of property for hire or profit between points within the state or to the owner of any motor vehicle carrying an auxiliary fuel tank or tanks providing an additional supply of motor fuel over and above that provided in the standard equipment of such vehicle.

II. PROVISIONS OF THE 1981 ACT

23 V.S.A. § 367(a) (Supp. 1981):

§ 367. Trucks

(a) The annual fee for registration of truck-tractors, or motor trucks except truck cranes, truck shovels, road oilers, bituminous distributors, and farm trucks used as hereinafter specified shall be based on the total weight of the truck-tractor or motor truck including body and cab plus the heaviest load to be carried. In computing the fees for registration of truck-tractors or motor trucks with trailers or semi-trailers attached, except trailers or semi-trailers with a gross weight of less than 6,000 pounds, the fee shall be based upon the weight of the truck-tractor or motor truck, the weight of the trailer or semi-trailer, and the weight of the heaviest load to be carried by the combined vehicles. For the purpose of this section a "truck-tractor" shall include all motor vehicles designed and used primarily for drawing other vehicles

and not so constructed as to carry a load other than a part of the weight of the vehicles and load so drawn. The fee shall be computed at the following rates per thousand pounds of the weight determined as above specified, the minimum fee for registering a truck-tractor or motor truck to 6,000 pounds shall be the same as for the pleasure car type:

$9.70 when the weight exceeds 6,000 pounds but does not exceed 8,000 pounds.

$11.15 when the weight exceeds 8,000 pounds but does not exceed 12,000 pounds.

$12.30 when the weight exceeds 12,000 pounds but does not exceed 16,000 pounds.

$13.15 when the weight exceeds 16,000 pounds but does not exceed 20,000 pounds.

$13.70 when the weight exceeds 20,000 pounds but does not exceed 30,000 pounds.

$14.05 when the weight exceeds 30,000 pounds but does not exceed 40,000 pounds.

$14.35 when the weight exceeds 40,000 pounds but does not exceed 50,000 pounds.

$14.50 when the weight exceeds 50,000 pounds but does not exceed 60,000 pounds.

$14.70 when the weight exceeds 60,000 pounds.

Fractions of thousand pounds shall be computed at the next highest thousand pounds, excepting, however, fractions of hundredweight shall be disregarded.

23 V.S.A. § 415 (Supp. 1981):

§ 415. Motor truck permits

In addition to any other provision of law relating to registration of motor vehicles, or fees paid there-

for, a person owning or operating a motor truck, as defined in section 420 of this title, upon the highways of the state, which is not registered in this state, shall apply to the commissioner of motor vehicles for a highway use permit for each such motor truck to be so operated. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. The application shall be accompanied by a permit fee of $40.00 for each motor truck listed in the application. The commissioner shall issue a permit and an identification tag, plate or sticker for each such motor truck, which tag, plate or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Any such permit and tag, plate or sticker shall become void on October 1 next following the date of issue. Such permit shall be carried in the motor truck and the tag, plate or sticker shall be affixed to said motor truck and at all times be visible and legible. For emergency purposes, the commissioner may by telegram, identifying the motor truck, authorize its operation without the attachment of tag, plate or sticker for a period not to exceed seven days from the date of issue of the permit. The telegram must be kept with the truck while being so operated.

23 V.S.A. § 415a (Supp. 1981):

§ 415a. Single trip permit

The commissioner may issue a single trip permit, authorizing operation for one trip into the state of Vermont without the attachment of a tag, plate or sticker for a period not to exceed seven days from date of issue of the permit. Single trip authorization must be kept with the truck while being so operated. The total cost of the permit and trip shall be $40.00 payable in advance.

23 V.S.A. § 417 (Supp. 1981):

§ 417. Trip permits

(a) In addition to the foreign truck registrations provided by sections 415-421 of this title, a person operating a motor truck on the highways of this state, which truck is registered in another state or province, shall pay a fee of $15.00 for each entry into the state. If more than one tax, fee or toll is imposed upon vehicle usage in another state, then there shall be charged an additional $10.00 for each entry into this state of any truck registered in the state charging the additional tax, fee or toll.

(b) In the event that a person so operates a motor truck on the highways of this state and fails to report that operation in accordance with regulations promulgated by the commissioner, the person shall pay a fee of $40.00 for each unreported entry into the state. The payment of the fee shall not preclude the imposition of penalties provided for in section 421 of this title.

III. PROVISIONS OF THE 1982 ACT

23 V.S.A. § 367(a) (*supra*, p. 3a), was amended in the following respects:

First, the schedule of registration fees, while unchanged with respect to trucks whose weight does not exceed 60,000 pounds, was changed to provide as follows for trucks whose weight exceeds 60,000 pounds:

$15.00 when the weight exceeds 60,000 pounds but does not exceed 70,000 pounds.

$15.50 when the weight exceeds 70,000 pounds but does not exceed 80,000 pounds.

$16.00 when the weight exceeds 80,000 pounds.

Second, the following sentence was added at the end of the subsection:

The annual registration fee for truck-tractors and motor trucks with a gross weight of 18,000 pounds or over shall be $50.00 less than the fee computed in accordance with this subsection.

23 V.S.A. § 415 (*supra* pp. 4a-5a), was replaced by the following new § 415:

§ 415. Non-diesel fuel user's license

(a) In addition to any other provision of law relating to registration of motor trucks with a gross weight of 18,000 pounds or over and powered by gasoline or any other non-diesel fuel, or fees paid therefor, a person owning or operating a motor truck upon the highways of the state, whether or not registered in this state, shall apply to the commissioner of motor vehicles for a non-diesel fuel user's license for each such motor truck to be so operated. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. The application shall be accompanied by a license fee of $50.00 for each motor truck listed in the application. The commissioner shall issue a license and an identification tag, plate or sticker for each such motor truck, which tag, plate or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Except as otherwise provided, any such license and tag, plate or sticker shall become void on October 1 next following the date of issue. Such licenses shall be carried in the motor truck and the tag, plate or sticker shall be affixed to said motor truck and at all times be visible and legible. For emergency purposes, the commissioner may by telegram, identifying the motor truck, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed twenty-one days from the date of issue of the license. The telegram must be kept with the truck while being so operated.

This section shall not apply to motor trucks owned by federal, state, provincial or municipal governments.

(b) A person owning or operating a motor truck as defined in subsection (a) of this section which is registered in this state and for which the fees required under section 367 have been paid, shall not be required to obtain the license or pay the fee as required in subsection (a) until his next registration renewal and annually thereafter.

(c) The commissioner may issue a single trip license authorizing operation for the trip into the state of Vermont without the attachment of a tag, plate or sticker for a period not to exceed seven days from the date of issue of the license. Single trip authorization must be kept with the truck while being so operated. The total cost of the license shall be $50.00 payable in advance.

23 V.S.A. §§ 415a and 417 (*supra*, pp. 5a-6a), were repealed.

23 V.S.A. § 3007 (Supp. 1982):

§ 3007. Diesel fuel user's license

(a) In addition to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owning or operating upon the highways of the state a motor truck, which is registered in the state, using fuel as defined in section 3002, shall, for each motor truck to be so operated, apply to the commissioner of motor vehicles on or before July 1, 1982 for a diesel fuel user license, which shall be renewed at the time of renewal of the truck's registration. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. Only applications filed at the time of

the initial registration or renewal of a registration shall be accompanied by a $50.00 annual license fee for each motor truck listed in the application except that no fee shall be required for motor trucks with a gross weight of less than 18,000 pounds.

(b) In addition to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owning or operating upon the highways of the state a motor truck using fuel, which is not registered in this state, shall apply to the commissioner of motor vehicles on or before December 1, 1982 for a diesel fuel user license for each such motor truck to be so operated. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. Except for motor trucks with a gross weight of less than 18,000 pounds, and vehicles licensed prior to December 1, 1982 under section 415, the application for issuance of initial and renewal licenses shall be accompanied by a $50.00 license fee for each motor truck listed in the application. The commissioner shall issue a license and an identification tag, plate or sticker for each such motor truck which tag, plate or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Any such license and tag, plate or sticker shall become void on October 1, 1983 and each October 1 thereafter. Such licenses shall be carried in the motor vehicle and the tag, plate or sticker shall be affixed to said motor vehicle and at all times be visible and legible. For emergency purposes, the commissioner may by telegram, identifying the motor vehicle, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed twenty-one days from the date of issue of the license. The telegram must be kept with the vehicle while being so oprated.

(c) A person owning or operating a motor bus upon the highways of the state, which is not registered in this state, shall apply to the commissioner of motor vehicles for an identification marker as provided by section 422 of this title which shall be conspicuously displayed on the motor bus while operated within the state. The owner or operator shall be required to file a report under the provisions of section 3014 and pay the tax imposed by section 3003 under the provisions of section 3015.

(d) This section shall not apply to users obtaining trip permits under section 3010 or 422(b) or to users' vehicles exempt from reporting requirements under section 3014 or to users' vehicles exempt from taxation under subdivision 3003(d)(3) and (5).

23 V.S.A. § 3010 (Supp. 1982):

§ 3010. Trip permits and temporary authorization

(a) An unlicensed user may obtain a single trip permit which shall be good for one motor truck for a period not to exceed seven consecutive days beginning and ending on the dates specified on the face of the permit. The fee for the permit for motor trucks with a gross weight of 18,000 pounds or over shall be $50.00. Fees for trip permits shall be in lieu of the tax otherwise payable by a user and no report under the provisions of section 3014 shall be required with respect to such motor vehicles. Single trip authorizations shall be kept with the vehicle while so being operated.

(b) Whenever the commissioner is satisfied that unforeseen or uncertain circumstances have arisen which require a user to operate in this state a motor truck for which no identification marker has been obtained, and if the commissioner is satisfied that prohibition of such operation would cause undue hardship, he may provide the user with temporary au-

thorization for the operation of such motor truck pending payment of the license fee as required by section 3007(b). The fee for the temporary authorization for motor trucks with a gross weight of 18,000 pounds or over shall be $50.00, and shall also constitute payment of the license fee required under section 3007(b). Temporary authorizations shall be kept with the vehicle while being operated and shall authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed 21 days from the date of issue of the license.

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No. 86-276

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM CONWAY, COMMISSIONER OF MOTOR VEHICLES, STATE OF VERMONT, *et al.*,
Cross-Petitioners

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Cross-Respondents

On Conditional Cross-Petition for a Writ of Certiorari to the Supreme Court of Vermont

---

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., IN RESPONSE TO CONDITIONAL CROSS-PETITION

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., IN RESPONSE TO CONDITIONAL CROSS-PETITION

The petition in No. 86-69 raises the important question whether the State of Vermont may, consistently with the Commerce Clause and the Fourteenth Amendment, refuse to refund taxes exacted in violation of the Constitution. In its conditional cross-petition, the State points out that the premise of this refund claim is the unconstitutionality of the taxes that motor carriers have been compelled to pay. Vermont accordingly asserts that if the Court reviews the correctness of the refusal to order a refund, it should at the same time review the holding invalidating the taxes in question.

1. We agree. At stake are fundamental questions about the protections afforded interstate commerce by the federal Constitution. Indeed, as the State correctly

notes (Cross-Pet. 7, 9), a direct conflict has emerged on the issue whether a state may enact a highway use tax structured so that it is paid solely by interstate commerce, and from which its own domiciliaries are effectively exempted, and defend it on the ground that locally-based motor carriers already pay other, different taxes. Now before the Court is the American Trucking Associations' appeal from the conflicting decision of the Supreme Court of Pennsylvania. *American Trucking Associations, Inc.* v. *Scheiner*, appeal docketed, No. 86-357 (U.S. Sept. 3, 1986). We have urged the Court to undertake plenary review of the discrimination issue in *Scheiner*, and we would not ask or expect the Court to require Vermont to pay a refund if Pennsylvania's indistinguishable tax were upheld.

2. Our agreement with Vermont goes no further. The State's efforts to defend the merits of its taxes are wholly unconvincing, for the reasons set forth in the Vermont Supreme Court's decision and explained at pages 18-24 of the Jurisdictional Statement in *Scheiner*. We do not here repeat those arguments. There are, however, a few specific points that should be made.

To begin with, Vermont appears to defend its taxes in part on the ground that interstate commerce can be made to pay its own way. It cites *Complete Auto Transit* and offers a strained and unrealistic hypothetical that appears to be predicated on the erroneous assumption that the entire cost of highway construction and upkeep must be funded by registration fees for Vermont-based vehicles (Cross-Pet. 11-12). But we have never suggested that interstate commerce should not be required to bear its fair share of any state's highway expenses. See *Scheiner* J.S. 15. We have insisted only that the Commerce Clause protects it from parochial and discriminatory legislation that shifts to interstate commerce and away from local highway users a disproportionate share of those costs.

The question is simply whether a tax structured to fall solely upon non-Vermont-registered trucks can overcome the constitutional prohibition of discrimination against interstate commerce. In answer to this question, Vermont points vaguely in the direction of its registration fees, which are not imposed directly on vehicles registered in other states, and invokes the compensatory tax doctrine. This argument is unconvincing because of the State's failure to recognize that foreign-registered carriers already indirectly pay Vermont registration fees by virtue of reciprocity. See Pet. App. 8a-9a. It is also flawed by the State's complete failure to cite, much less discuss, cases decided by this Court after 1981 that shed important light on the application of the compensatory tax doctrine, especially *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). As noted above, the Jurisdictional Statement in *Scheiner* sets forth the application of these principles to highway use taxes such as those of Vermont and Pennsylvania.

3. Assuming, as both sides to this case agree, that the Commerce Clause issue requires this Court's consideration, the question remains whether that should be done here, in *Scheiner*, or by granting review in both cases. We believe that the Court should at a minimum note probable jurisdiction in *Scheiner*. That case presents not only the substantive issue of structural discrimination on which the Supreme Courts of Vermont and Pennsylvania are in direct conflict but also a second, related highway tax issue of great legal and practical significance: the permissibility under the Commerce Clause of facially neutral taxes that are significantly discriminatory in practical operation.* The petition in No. 86-69 complements these issues by adding the important question whether the Constitution permits a state to refuse

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* This second issue is also presented by the pending appeal in *American Trucking Associations, Inc.* v. *Gray*, appeal docketed, No. 86-358 (U.S. Sept. 3, 1986).

to refund a tax exacted in violation of the Commerce Clause.

In sum, we believe that the Court should grant review both in *Scheiner* and in No. 86-69, giving it the opportunity to consider at one time the full range of these issues, and should hold the cross-petition in No. 86-276. In the alternative, the Court may prefer to hold both No. 86-69 and No. 86-276 pending a decision in *Scheiner*.

Respectfully submitted.

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REPLY BRIEF FOR CONDITIONAL CROSS-PETITIONERS

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IN THE

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REPLY BRIEF FOR CONDITIONAL CROSS-PETITIONERS

We submit this reply brief to address the suggested dispositions that appear at p. 4 of the brief for cross-respondents (hereinafter "ATA"). ATA there states:

> [W]e believe the Court should grant review both in *Scheiner* [*American Trucking Associations, Inc.* v. *Scheiner*, No. 86-357] and in No. 86-69 [ATA's petition in the instant case] . . . and should hold the cross-petition in No. 86-276. In the alternative, the Court may prefer to hold both No. 86-69 and No. 86-276 pending a decision in *Scheiner*.

Neither of these suggested courses makes sense, as we briefly explain.

In No. 86-69, ATA's petition seeks review of the Vermont Supreme Court's ruling that the state's sovereign

immunity precludes the state courts from entering a monetary award payable from the state treasury. That issue is *not* presented in *Scheiner*, nor in any other case now pending in this Court. Accordingly, it would make no sense to "hold" the petition in No. 86-69.

The state's cross-petition herein, No. 86-276, *does* present the same issue as *Scheiner* (whether substantially similar state tax statutes offend the Commerce Clause), but the cross-petition is *conditional*. Thus, unless the Court were to decide to grant certiorari in No. 86-69, the disposition of the cross-petition would be automatic.

For these reasons, we submit that the only sensible course is to first address whether certiorari should be granted in No. 86-69. If this Court concludes that it lacks jurisdiction over the issue presented in No. 86-69, or that that issue does not warrant the Court's plenary consideration, then the petition in No. 86-69 and the conditional cross-petition in No. 86-276 both should be denied.

If the Court were to conclude that certiorari *should* be granted in No. 86-69, still it would make no sense to "hold" the cross-petition in No. 86-276, as ATA alternatively suggests. That course would have the Court deciding the remedial issue while postponing consideration of the question whether there is any violation to remedy. Thus, if certiorari is granted in No. 86-69, it should be granted as well in No. 86-276.

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On Petitions for a Writ of Certiorari to the Supreme Court of Vermont

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SECOND SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

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SECOND SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

This memorandum is filed to address the impact of the decision in *American Trucking Associations, Inc.* v. *Scheiner*, No. 86-357 (June 23, 1987), on the pending petition and cross-petition in the above-captioned cases.[1]

[1] Our first supplemental memorandum, filed in September 1986, called the Court's attention to the decision of the Supreme Court of New Hampshire in *Private Truck Council of America, Inc.* v. *New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986). That decision embraced legal principles squarely contradictory to those followed by the court below with respect to the duty to refund unconstitutional taxes.

The issue raised by the petition is whether the Constitution obligates Vermont to refund moneys collected from petitioners pursuant to flat highway taxes found to violate the Commerce Clause or whether the State may invoke principles of sovereign immunity to preclude a refund remedy. The State's conditional cross-petition challenges the underlying holdings of the Vermont Supreme Court that the taxes at issue violate the Commerce Clause.

We assume that this Court has withheld action in this case because the important refund issue it presents would have been mooted by a decision upholding the lawfulness of the similar Pennsylvania highway taxes involved in *Scheiner*. Now that *Scheiner* has been decided against the constitutionality of the taxes there at issue, however, the refund question is ripe for consideration and is of vital importance to the trucking industry and the states. Accordingly, we submit that the Court should grant ATA's petition and deny Vermont's cross-petition.

1. The $40 entry fee provided by Vermont's Act 87 and the $50 decal tax enacted by Act 172 were each subject to attack on two grounds. First, they were challenged as embodying a facial or structural discrimination: the entry fee in terms applied only to out-of-state trucks, and the decal tax, though seemingly neutral on its face, was in fact accompanied by an equal reduction in truck registration fees that fully offset its financial impact on Vermont-registered trucks. Second, both taxes were challenged as discriminatory because they were "flat"—i.e., not related to the extent of any vehicle's actual use of Vermont's highways.

In the challenge to Act 172, the Vermont Superior Court found that the decal fee had a discriminatory impact in actual operation because it imposed a per-mile cost 22 times greater for out-of-state trucks than for Vermont-registered trucks (86-69 Pet. App. 59a). It accordingly held that Act 172's "flat tax" feature vio-

lated the Commerce Clause. The Vermont Supreme Court agreed that Act 172 (and Act 87 as well) was unconstitutional, but it rested its holdings on the alternative ground that the taxes entailed facial discrimination not justified under the compensatory tax doctrine (*id.* at 7a-8a, 18a-20a).

Although this Court in *Scheiner* had no occasion to reach the facial discrimination issue that was common to both cases, the decision makes clear beyond peradventure that Vermont's taxes violate the Commerce Clause in precisely the same manner as Pennsylvania's axle tax and marker fee. Vermont's taxes, like Pennsylvania's, were of a fixed amount unrelated to the extent of actual highway use. As the Court stated in *Scheiner*, such highway taxes are "plainly discriminatory" because "they impose a cost per mile on [out-of-state] trucks that is [many times greater than] the cost per mile borne by local trucks" (slip op. 18). Thus, there is absolutely no reason to review the issue raised in Vermont's cross-petition (No. 86-276).

2. Because the ruling in *Scheiner* establishes that Vermont exacted highway taxes from out-of-state companies in violation of the Commerce Clause, the refund issue raised in the petition is fully ripe for adjudication by this Court. We need not repeat here the reasons fully canvassed in our petition and reply brief why this question is important and timely. We simply note two intervening developments that bear upon the decision whether to grant review on this issue.

a. Vermont's principal argument in opposition to the petition was the claim that ATA had not preserved, and as a result the Vermont Supreme Court had not passed upon, the question whether the Constitution requires a refund of taxes collected in violation of the Commerce Clause. We have answered that argument at pages 1-7 of our reply brief. Our submission has been confirmed by a recent Vermont state court decision. In *American*

Trucking Associations, Inc. v. *Conway*, No. S-95-86WnC (Washington Co. May 4, 1987), the Vermont Superior Court held unconstitutional highway tax legislation adopted by the State following the invalidation of Act 172.[2] Nevertheless, the Superior Court denied a refund of the unconstitutionally-exacted taxes and expressly rejected ATA's arguments based on a constitutional right to a refund. The Superior Court stated that the Vermont Supreme Court had necessarily rejected those federal claims in the decisions below in the instant case and that it was "bound by those decisions." Slip op. 10.

b. In *First Lutheran Church* v. *Los Angeles County*, No. 85-1199 (June 9, 1987), the Court faced a similar question—whether a state could limit the remedies for a violation of the Takings Clause to injunctive relief, or whether the Constitution requires the payment of monetary compensation *ex proprio vigore*. The Court held that the Constitution itself requires a monetary remedy for the constitutional violation, despite claims of sovereign immunity. See slip op. 10-11 & n.9. This decision casts further doubt on Vermont's contention that a state may exact taxes in violation of the Commerce Clause and then assert sovereign immunity to defeat a claim for a refund of the wrongfully withheld property.

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[2] A copy of this opinion has been lodged with the Clerk of the Court.

It is therefore respectfully submitted that the petition for a writ of certiorari in No. 86-69 should be granted and the cross-petition in No. 86-276 should be denied.

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